IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:	*BC Freedom of Information and Privacy Association v. British Columbia (Attorney General),* 2014 BCSC 660

Date: 20140416
Docket: 13-0335
Registry: Victoria

Between:

B.C. Freedom of Information and Privacy Association

Plaintiff

And

Attorney General of British Columbia

Defendant

Before: The Honourable Mr. Justice Cohen

Reasons for Judgment

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Place and Date of Hearing:	Victoria, B.C. November 4 - 5, 2013
Place and Date of Judgment:	Victoria, B.C. April 16, 2014

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I. INTRODUCTION

[1] This application is made by the plaintiff, the B.C. Freedom of Information and Privacy Association, for a declaration that, to the extent it applies to third party election advertising expenditures of less than $500, s. 239 of the *Election Act*, R.S.B.C. 1996, c. 106 (the "*Act*"), unjustifiably infringes s. 2(b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (the "*Charter*"), and is, to that extent, of no force and effect. The application is made pursuant to R. 9-7 of the *Supreme Court Civil Rules* (the "*Rules*").

[2] The plaintiff, a non-profit society that advocates in a variety of ways for access to information from government and for the protection of privacy, claims that

it is, and has been, directly affected by the third party election advertising registration scheme that it challenges in this action. The plaintiff asserts that for expenditures valued at under $500, there is no justification for the provincial government to require registration, and, as a result, s. 239 of the *Act* is unconstitutional.

[3] The defendant, the Attorney General of British Columbia (the "Attorney General"), says that s. 239 of the *Act* does not infringe freedom of expression under s. 2(b) of the *Charter*. The Attorney General submits that the registration requirement in no way restricts the content or extent of election advertising, but rather promotes transparency and accountability in electoral discourse by informing the electorate of the source of the speech. The Attorney General says that the registration requirement also assists Elections BC in administering and enforcing the election advertising spending limits in the *Act*.

[4] The Attorney General says s. 239 is a trivial and insubstantial constitutional burden, and the action should therefore be dismissed on the basis that the plaintiff cannot establish that it infringes freedom of expression. In the alternative, if this Court is satisfied that s. 239 of the *Act* infringes the plaintiff's freedom of expression contrary to s. 2(b), the Attorney General submits that any such infringement is demonstrably justified under s. 1 of the *Charter*.

II. BACKGROUND

A. Legislative History

[5] Some of the legislative history of s. 239 and the underlying legal principles of the *Act* is detailed in the parties' submission.

[6] Section 239 was enacted in 1995 as part of a complete overhaul and modernization of the *Act*. The legislative amendments introduced, for the first time in British Columbia, election financing and advertising rules that included disclosure requirements and advertising spending limits.

[7] The goals of the amended legislation were fairness, openness, and accessibility in the electoral process. As stated by then Attorney General Colin

Gabelmann, in introducing the new legislation (British Columbia, Legislative Assembly, *Debates of the Legislative Assembly (Hansard)*, 35th Parl, 4th Sess, No. 15 (1 June 1995) at 14791):

> With the introduction of this bill, government is fulfilling its commitment to modernize the electoral process and to make it more fair, open and accessible to all voters. Under the new law, the electoral process will be made more accessible by expanding voter registration and voting opportunities. By introducing British Columbia's first election financing rules, this legislation is a milestone in B.C.'s history of electoral reform.
>
> The introduction of these financing rules will bring this province in line with standards set across the country. Voters will now be able to learn who is financing the political process in B.C. Registered political parties, constituency associations, candidates and leadership contestants will be required to disclose contributions and expenses. The openness of the electoral process is also enhanced by new disclosure requirements for election advertising and election opinion surveys. This legislation will increase fairness in the electoral process by introducing spending limits for parties and candidates. To maintain the integrity of these spending limits, and to ensure a level playing field for all participants in the election, third-party advertising will also be restricted.

[8] Since 1995, various intervening amendments have been made to the *Act*. Some of the amendments, relevant to the case at bar, were the result of constitutional challenges and are canvassed below. However, with respect to the provisions that are central to the present proceeding, the *Act* is substantially similar to the 1995 *Election Act*. Specifically, s. 239 requires third party advertising sponsors to register; s. 240 sets out the conditions of registration; s. 241 details the obligations of a registered sponsor; and, s. 231 requires all election advertising to indicate the identity of the third party sponsor and provide contact information.

B. The *Act*

[9] Section 239 of the *Act* requires individuals and organizations to register under Division 3 of the *Act* in order to be permitted to sponsor election advertising, which includes incurring third party election advertising expense. The section reads as follows:

> Election advertising sponsors must be registered
>
> 239 (1) Subject to subsection (2), an individual or organization who is not registered under this Division must not sponsor election advertising.

(2) A candidate, registered political party or registered constituency association is not required to be registered as a sponsor if the individual or organization is required to file an election financing report by which the election advertising is disclosed as an election expense.

(3) An individual or organization who is registered or required to be registered as a sponsor must be independent of registered political parties, registered constituency organizations, candidates, agents of candidates and financial agents, and must not sponsor election advertising on behalf of or together with any of these.

[10] "Election advertising" is defined in s. 228 of the *Act* as follows:

"election advertising" means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

(a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,

(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, or

(d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views.

[11] The effect of the decision in *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, aff'd 2011 BCCA 408 [*BCTF*], discussed in further detail below, is that the definition of "election advertising" no longer includes advertising during the time before the campaign period begins. "Campaign period" is defined in s. 1 of the *Act* as "the period between when the election is called and the close of general voting for the election."

[12] Section 240 of the *Act* sets out the registration requirements, which include a notarized application being made to the Chief Electoral Officer ("CEO"). Pursuant to s. 4 of the *Act*, the CEO is an independent officer of the Legislature, appointed by a select standing committee of the Legislature. Section 240 provides as follows:

Registration with chief electoral officer

240 (1) An individual or organization who wishes to become a registered sponsor must file an application in accordance with this section with the chief electoral officer.

(2) An application must include the following:

(a) the full name of the applicant and, in the case of an applicant organization that has a different usual name, this usual name;

(b) the full address of the applicant;

(c) in the case of an applicant organization, the names of the principal officers of the organization or, if there are no principal officers, of the principal members of the organization;

(d) an address at which notices and communications under this Act and other communications will be accepted as served on or otherwise delivered to the individual or organization;

(e) a telephone number at which the applicant can be contacted;

(f) any other information required by regulation to be included.

(3) An application must

(a) be signed, as applicable, by the individual applicant or, in the case of an applicant organization, by 2 principal officers of the organization or, if there are no principal officers, by 2 principal members of the organization, and

(b) be accompanied by a solemn declaration of an individual who signed the application under paragraph (a) that the applicant

(i) is not prohibited from being registered by section 247, and

(ii) does not intend to sponsor election advertising for any purpose related to circumventing the provisions of this Act limiting the value of election expenses that may be incurred by a candidate or registered political party.

(4) The chief electoral officer may require applications to be in a specified form.

(5) As soon as practicable after receiving an application, if satisfied that the requirements of this section are met by an applicant, the chief electoral officer must register the applicant as a registered sponsor in the register maintained by the chief electoral officer for this purpose.

(6) If there is any change in the information referred to in subsection (2) for a registered sponsor, the sponsor must file with the chief electoral officer written notice of the change within 30 days after it occurs.

(7) A notice or other communication that is required or authorized under this Act to be given to a sponsor is deemed to have been given if it is delivered to the applicable address filed under this section with the chief electoral officer.

[13] In addition to the obligation to provide the CEO with written notice of any change in the information submitted in the application (s. 240(6) of the *Act*), a registrant has the following obligations as set out in s. 241:

> Obligations of registered sponsor
>
> 241(1) The identification of a registered sponsor referred to in section 231 must be a name filed by the sponsor under section 240 with the chief electoral officer.
>
> (2) An individual or organization who is registered or required to be registered as a sponsor must maintain records of the following information in respect of contributions received by the sponsor:
>
> > (a) in the case of anonymous contributions, the date on which the contributions were received, the total amount received on each date and, if applicable, the event at which they were received;
> >
> > (b) in other cases, the information referred to in section 190 (1)(a) to (e), with the class of contributor recorded in accordance with section 245(2).

[14] Section 231 of the *Act* requires that the identity of a sponsor be disclosed on election advertising:

> 231 (1) Subject to subsection (2), an individual or organization must not sponsor, or publish, broadcast or transmit to the public, any election advertising unless the advertising
>
> > (a) identifies the name of the sponsor or, in the case of a candidate, the name of the candidate's financial agent or the financial agent of the registered political party represented by the candidate,
> >
> > (b) if applicable, indicates that the sponsor is a registered sponsor under this Act,
> >
> > (c) indicates that it was authorized by the identified sponsor or financial agent, and
> >
> > (d) gives a telephone number or mailing address at which the sponsor or financial agent may be contacted regarding the advertising.
>
> (2) Subsection (1) does not apply to any class of election advertising exempted under section 283.
>
> > The chief electoral officer, or a person acting on the direction of the chief electoral officer, may remove and destroy, without notice to any person, or require a person to remove or discontinue, and destroy, any election advertising that does not meet the requirements of subsection (1) and is not exempted under subsection (2).

[15] Third party sponsors who spend $500 or more in election advertising during a campaign period face additional obligations under Part 11, Division 4 of the *Act* ("Disclosure of Independent Election Advertising"), including the requirement to file a disclosure report.

[16] The possible penalties for contravening ss. 231, 239, or 241, among others, are set out in s. 264 as follows:

> Offences in relation to election advertising and other promotion
>
> 264 (1) An individual or organization who does any of the following commits an offence:
>
> …
>
> (b) contravenes section 231 respecting identification of the sponsor of election advertising;
>
> …
>
> (h) contravenes section 239 respecting the requirement to be registered as a sponsor;
>
> (i) fails to record information as required by section 241 (2).
>
> (2) An individual or organization who commits an offence under subsection (1) is liable to a fine of not more than $10 000 or imprisonment for a term not longer than one year, or both.

[17] The plaintiff in this proceeding challenges only s. 239 of the *Act*.

C. The Registration Process under the *Act*

[18] Elections BC is a non-partisan, independent office of the Legislature of British Columbia, responsible for administering electoral finance laws such as election advertising, registration, and financial reporting and disclosure. Elections BC also provides information and guidance to the public and those engaged in electoral events about their responsibilities in relation to electoral finance. The role of Elections BC encompasses the registration of third party advertising sponsors.

[19] The mechanics of registration, and the role of Elections BC in administering the *Act*, were reviewed before the Court in the affidavit of Nola Western, the Deputy Chief Electoral Officer, Funding and Disclosure, with Elections BC. As Ms. Western deposes, Elections BC plays no role in this proceeding in commenting on the constitutionality of the *Act*.

[20] A third party sponsor is required to register once and then provide a registration update for subsequent campaign periods. The initial registration requires a solemn declaration, while the registration update does not. The solemn declaration required on initial registration must be witnessed by a Commissioner for Taking Affidavits in British Columbia, which is a service available free of charge at the office of the CEO in Victoria, at any District Electoral Office, or at any Service BC Centre.

[21] Elections BC uses registration information primarily as contact information, to enable it to communicate with sponsors to ensure they understand the rules and to provide information of assistance in complying with the rules.

[22] Since s. 239 of the *Election Act* was enacted in 1995, no individual or organization has been fined for not having registered before sponsoring election advertising. Complaints about unauthorized election advertising are generally addressed by Elections BC at an administrative level, through contacting the individuals and organizations in question, explaining the rules, and encouraging compliance.

III. THE LAW

A. Guarantee of Freedom of Expression under s. 2(b) of the *Charter*

[23] Section 2(b) of the *Charter* provides:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.]

[24] Freedom of expression is one of the most fundamental values of democratic society, and political expression lies at the heart of the values sought to be protected by its guarantee under s. 2(b) of the *Charter*: see *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at paras. 28-29 [*Libman*]; *Reference re Election Act (BC)*, 2012 BCCA 394 [*Election Act Reference*], at para. 23.

[25] Political expression, as protected under s. 2(b) of the *Charter*, includes third party election advertising. In *Election Act Reference*, Lowry J.A., writing for the Court, stated at paras. 24-25:

> [A]s Mr. Justice Bastarache, who spoke for the majority, observed in *Harper* at para. 66, "[m]ost third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression". More particularly, he said:
>
> > [84] Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, [Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report*, Ottawa: Supply and Services Canada, 1991] at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection. As Dickson C.J. explained in *Keegstra*, [*R. v. Keegstra*, [1990] 3 S.C.R. 697], at pp. 763-64:
> >
> > > The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.
>
> Interfering with the freedom of political expression must then be justifiable only where there are the clearest and most compelling reasons for doing so. That said, at least some measure of restriction is recognized as essential where it is necessary to preserve the fairness of the election process. Unlimited third-party election advertising can undermine the fairness of an election where it permits those with the resources to monopolize the election discourse. …

[26] In *Figueroa v. Canada (Attorney General)*, 2003 SCC 37 [*Figueroa*], Iacobucci J. remarked as follows, at paras. 28-29, on the importance of encouraging participation in political debate and the electoral process:

> Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: see *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 326; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R 573, at p. 583; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23. This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy.

[27] Author Colin Feasby has commented on the unique role played by third parties in the process of political deliberation. In his paper, "Freedom of Expression and the Law of the Democratic Process" (2005), 29 S.C.L.R. (2d) 237, Feasby states, at p. 264:

> Third parties, unlike candidates and political parties, are not inhibited from raising controversial subjects by concern for their electoral fate nor do they have a vested interest in the political process itself. Third parties are, therefore, uniquely positioned to criticize the status quo and the shared values of candidates and political parties. For example, third parties can effectively attack government waste and corruption in a way that candidates and political parties cannot or will not. When third parties function in this manner they broaden political discourse and enhance the value of citizens' democratic rights.

[28] In *Harper v. Canada (Attorney General)*, 2004 SCC 33 [*Harper*], McLachlin C.J. and Major J. stated in minority reasons (dissenting in part), that freedom of expression, in the context of political discourse, has two aspects: protecting listeners as well as speakers. As stated at para. 17:

> Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public -- as viewers, listeners and readers -- have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal, supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers[.]

B. Test for Infringement

[29] The Supreme Court of Canada has adopted a two-step approach to determining whether there has been a violation of s. 2(b): see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at paras. 40, 45 [*Irwin Toy*]. First, the Court must inquire as to whether the government activity at issue falls within the sphere of conduct protected by the guarantee of freedom of expression. Second, if the activity is not excluded from the protection of s. 2(b) of the *Charter*, the Court

must proceed to the second step and ask whether the purpose or effect of the government action is to restrict freedom of expression.

[30] A broad and inclusive approach is to be given to the protected sphere of free expression under the first step of the test: see *Irwin Toy*, at para. 43.

[31] Under the second step of the test, the Court must first consider the purpose of the government action or legislation in question. If its purpose was to restrict expression, then there has been a limitation by law of s. 2(b), and an analysis under s. 1 of the *Charter* is required to determine if the infringement is justified (*Irwin Toy*, at para. 47).

[32] With respect to the purpose test, the majority in *Irwin Toy* cautioned against “drifting to … extremes”. As stated at para. 48:

> When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government’s purpose is virtually always to restrict expression. On the other hand, the government can almost always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government’s purpose must be assessed from the standpoint of the guarantee in question.

[33] The majority in *Irwin Toy* went on to provide the following guidance in applying the purpose test, at para. 49:

> If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described this distinction as follows (Freedom of Expression (1981), at pp. 59-60:
>
>> The bold line...between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful"

> information, ideas, or emotions and the state's often justifiable desire to secure other interests from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

[34] If the legislation survives the purpose test, the onus shifts to the plaintiff to demonstrate that the effects of the impugned provision are unconstitutional. In order to so demonstrate, the plaintiff must state its claim with reference to the principles and values underlying the freedom: see *Irwin Toy*, at para. 52. The majority in *Irwin Toy* provided further guidance on the application of these values to the test as follows (at para. 53):

> We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They … can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

[35] If, on the basis of the two-step test set out in *Irwin Toy*, the purpose or effect of the government action or legislation in question is determined to be the restriction of expression, then there has been an infringement of the right protected by s. 2(b), and an analysis under s. 1 of the *Charter* is required to determine if the infringement is justified.

[36] Where the burden imposed on a *Charter* right is “miniscule” or “trivial or insubstantial”, it may not be necessary to turn to s. 1 to justify the legislation in question: See *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at para. 97

[*Edwards Books*], and *R. v. Jones*, [1986] 2 S.C.R. 284, Wilson J., dissenting, at para. 65 [*Jones*], for a discussion of the principle in the context of s. 2(a) of the *Charter* (freedom of religion).

C. Test under s. 1 of the *Charter*

[37] Section 1 of the *Charter* provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[38] The approach set out by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 [*Oakes*], at paras. 63-71, guides the analysis of whether an infringement of a *Charter* guarantee can be justified in a free and democratic society. The *Oakes* test was stated as follows at para. 26 of *Election Act Reference*. In order to be "demonstrably justified" as required by s. 1 of the *Charter*:

> a. the law must be directed towards an objective that is sufficiently pressing and substantial to justify limiting a *Charter* right; and
>
> b. the law must be proportionate, in the sense that
>
> i. the measures chosen are rationally connected to the objective;
>
> ii. those measures impair as little as possible the *Charter* right in question; and
>
> iii. there is proportionality both between the objective and the deleterious effects of the statutory restrictions, and between the deleterious and salutary effects of those restrictions.

[39] McLachlin J. (as she then was), in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 [*RJR-MacDonald*], provided the following guidance as to the application and meaning of the s. 1 test, at para. 129:

> The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has

> not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

[40] In *Libman*, at para. 60, the Court emphasized that where political expression is infringed, a high test should be imposed for justification under s. 1:

> Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection, that is, the courts should generally apply a high standard of justification to legislation that infringes the freedom of political expression.

[41] Having set out the legal principles guiding the analysis of an alleged infringement of s. 2(b) of the *Charter*, I turn now to consider how these principles have been applied in the past to the *Act*.

D. Constitutional Challenges to the *Act*

[42] Provisions of the 1995 *Election Act* that limited the amount that third parties could spend on advertising during election campaigns, and imposed certain requirements on those who first published or reported election opinion surveys, were the subject of a successful constitutional challenge in *Pacific Press v. British Columbia (Attorney General)*, 2000 BCSC 248 [*Pacific Press*]. In that case, the Attorney General conceded that the third party election advertising spending limits infringed the guarantee of freedom of expression under s. 2(b) of the *Charter*, but argued the infringement could be justified under s. 1.

[43] The Court in *Pacific Press* held that third party election advertising spending limits were not justified under s. 1 of the *Charter*, as the Attorney General had failed to demonstrate that the breach of rights was necessary to meet a pressing and substantial objective. The Attorney General had argued, and the Court accepted, that the objective of the legislated limits was “fairness”, i.e. to promote a level playing field for candidates such that each has an equal opportunity to present its case to voters (paras. 69-75). However, the Court noted that the empirical evidence did not suggest that the legislation was responding to any objectively measured concern about fairness.

[44] On the use of empirical evidence under the s. 1 test, the Court stated as follows at para. 78:

> It is clear that the government is not obliged to wait until a problem occurs before taking legislative steps. The plaintiffs concede and I concur that the Supreme Court of Canada has stated that in certain circumstances common sense and reasonable apprehension of a concern may guide the government.

[45] However, where scientific or empirical evidence is available (para. 79):

> [T]here is in my view no authority for the proposition that claims of common sense justification are to be preferred over scientific evidence or that claims of common sense justification can rebut scientific evidence.

[46] On the evidence in the case before it, the Court concluded as follows (at para. 93):

> In my view it is not open to the [Attorney General] in light of the scientific evidence to the contrary to rely on a reasonable apprehension of harm as the justification for the impugned legislation. The apprehension is not reasonable when there is scientific evidence contrary to the basis of the apprehended belief.

[47] With respect to the requirements imposed by the legislation on those who first published or reported election opinion surveys, the Court held that the legislation violated s. 2(b) of the *Charter* and, like the third party spending limits, could not be justified under s. 1 because the Attorney General had failed to demonstrate a pressing or substantial objective (paras. 184, 190).

[48] In *BCTF*, the plaintiffs challenged the constitutionality of the provisions of the *Act* that set out limits on the amount of election advertising that third parties could sponsor and that defined “election advertising”, in part, on the ground that the restrictions unjustifiably infringed their rights under s. 2(b) of the *Charter*. The Attorney General conceded that the impugned provisions restricted expression under s. 2(b) but argued they were reasonable limits justified under s. 1.

[49] At trial, the Court began by describing the then recent changes to the electoral regime in British Columbia as follows:

> **13** An election is called by the Lieutenant Governor who dissolves the legislature and issues an Order in Council directing the Chief Electoral Officer

> (the "CEO") to issue the writs of election. Pursuant to s. 27 of the [*Election*] *Act*, voting day is the 28th day after the date on which the election is called. The [*Election*] *Act* defines this 28-day period between the calling of the election and the close of general voting as the "campaign period".
>
> **14** In 2001, British Columbia became the first jurisdiction in Canada to adopt fixed election dates. As a result of amendments to the *Constitution Act*, R.S.B.C. 1996, c. 66, elections are now held every four years on the second Tuesday in May, barring earlier dissolution by the Lieutenant Governor. The first fixed date election was held on May 17, 2005.
>
> **15** On April 30, 2008, the Attorney General of British Columbia introduced *Bill 42*, *Election Amendment Act, 2008*, 4th sess., 38th Parl., 2008 [*Bill 42*] which amended the [*Election*] *Act*. The sections of *Bill 42* that are material to these proceedings received Royal Assent and came into force on May 29, 2008. Those sections, *inter alia*, amended the definition of election advertising; modified the election spending limits imposed on political parties and candidates; introduced limits on third party election advertising; and extended the third party election advertising limits beyond the campaign period.

[50] The constitutionality of the impugned provisions in *BCTF* turned on proportionality, the second stage of the test under s. 1 of the *Charter*. Cole J. accepted, at para. 158, the assertion of the Attorney General that the objectives of the impugned provisions were to promote equality in political discourse, protect the integrity of the financial regime applicable to candidates and parties, and ensure that voters have confidence in the electoral process, and concluded, at para. 188, that the impugned provisions were rationally connected to those objectives. However, his Lordship was not satisfied that the impugned provisions were minimally impairing. As stated at para. 266:

> Even according the Attorney General a healthy measure of deference, I am not satisfied that the harm sought to be addressed by extending the third party spending restrictions into the pre-campaign period has been adequately demonstrated. On the other hand, I consider their effect in impairing the plaintiffs' s. 2(b) freedoms to be anything but minimal.

[51] Ultimately, the Court upheld the new definition of "election advertising" and the spending limits on third party election advertising, but held the restrictions could only be justified during the campaign period, not during a pre-campaign period. Cole J. stated as follows at para. 280:

> While I accept that the salutary effects identified in *Harper* exist in the present case insofar as the campaign period is concerned, I am not satisfied that they all exist in relation to the pre-campaign period. As is evident from my discussion of minimal impairment, I do not consider that the impugned

> provisions are necessary to protect the integrity of the political party and candidate spending limits during the pre-campaign period. I also do not consider that they increase confidence in the electoral process, given the extent to which they unnecessarily inhibit political speech while the legislature is in session. ...

[52] The decision of Cole J. at trial was upheld on appeal. With respect to the conclusion as to the overbreadth of the impugned measures, Ryan J.A. commented as follows (para. 70):

> I agree with the trial judge. The effect of the impugned legislation overshoots its overall objective of electoral fairness. It follows that it cannot be said that the infringement minimally impairs the right to freedom of expression. Its deleterious effect - that it captures otherwise constitutionally protected speech commenting on the wisdom of proposed legislation, or legislation left out of the agenda, for example, - far outweighs the salutary effect of equalizing political discourse during the pre-campaign period. I would not accede to this ground of appeal.

[53] The Court of Appeal decision in *BCTF* also rejected the Attorney General's argument that the trial judge had erred by not giving any weight to the fact that other jurisdictions had imposed spending limits on third parties outside campaign periods, noting that the actions of other governments were not conclusive as to the necessity of the measure in British Columbia (paras. 44, 60).

[54] In *Election Act Reference*, the Court was referred to the further amendments to the *Act* made following the decision in *BCTF*, which continued to limit the amount of money third parties could spend on election advertising in advance of the campaign period. The opinion of the Court was that the extension of election advertising spending into a pre-campaign period remained unconstitutional even on the government's proposed amendments.

E. Previous Constitutional Challenges to Registration Requirements and Other Restrictions

1. Canadian authority

[55] In *Libman*, the Supreme Court of Canada held that the provisions regulating expenses under Quebec's *Referendum Act* were unconstitutional on the basis that they violated freedom of expression under s. 2(b) of the *Charter* and were not minimally impairing under s. 1. While the parties in *Libman* agreed that the

objectives of the impugned provisions, i.e. to prevent affluent members of society from exerting a disproportionate influence and to permit an informed voter choice to be made by ensuring that some positions are not buried by others, were pressing and substantial; the appellant argued that their effect was to require him to join or affiliate himself with one of the national committees in order to incur expenses in the regulated categories; or, conversely, to limit himself to expenses in the unregulated categories if he wished to conduct a referendum campaign independent of those committees.

[56] In conducting its analysis, the Court noted with approval the recommendation of the Lortie Commission, a federal commission with the mandate of improving and preserving the democratic character of federal elections in Canada, to impose limits on third party expenses. As stated at paras. 77-78:

> … limits on spending by third parties in addition to the limits imposed on the national committees are necessary and must be far stricter than those on spending by the national committees in order to ensure that the system of limits and a balance in resources is effective ... Nonetheless, we are of the view that the limits imposed under s. 404 [of the *Referendum Act*] cannot meet the minimal impairment test in the case of individuals and groups who can neither join the national committees nor participate in the affiliation system. In our view, there are alternative solutions far better than the limits imposed under [s. 404] that are consistent with the legislature's highly [laudable] objective. The Lortie Commission's recommendation on third party expenses is one possible solution.
>
> To guarantee the operation of the system of election spending limits, the Lortie Commission recommended, inter alia, that groups and individuals not connected with a political party or candidate (independents) be prohibited from incurring election expenses exceeding $1000 and from pooling these amounts (Lortie Commission, supra, at pp. 350-56). This recommendation made it possible for all practical purposes to ensure that the balance in the financial resources of the parties and candidates was respected without radically restricting the freedom of expression of independents. By allowing a certain amount without limits on how it was to be used, the Commission ensured that independents would be able to assert their points of view and that they would have some leeway in choosing forms of expression. Furthermore, by allowing a relatively low amount and prohibiting pooling, the Commission removed the temptation for parties or organizations of candidates to split into small groups in order to multiply and thus increase the limits imposed on their campaigns by the Canada Elections Act. In this way, the Commission ensured that the impact of its infringement of the principle of limiting election spending by parties and candidates would be minimal enough for the system to remain effective. …

[57] In *Harper*, the constitutionality of several provisions of the *Canada Elections Act*, S.C. 2000, c. 9, was considered, including spending limits on third party election advertising that had been enacted pursuant to the recommendations of the Lortie Commission and the guidance provided by the decision in *Libman*.

[58] The attribution, registration, and disclosure provisions of the statute at issue in *Harper* required a third party to identify itself in all of its election advertising and, under certain circumstances, to appoint financial agents and auditors who were required to record expenses, to register with, and to report to the Chief Electoral Officer who, in turn, would make this information available to the public. Third parties were not required to register unless they incurred expenses of $500 or more in relation to election advertising. Section 353, one of the impugned provisions, provided as follows (para. 53):

> 353. (1) A third party shall register immediately after having incurred election advertising expenses of a total amount of $500 and may not register before the issue of the writ.

[59] Bastarache J., writing for the majority, dealt briefly with the question of whether the provisions constituted an infringement of s. 2(b) of the *Charter*. The Attorney General had conceded that the limits on election advertising expenses infringed s. 2(b) of the *Charter*, but not the other provisions. Bastarache J., beginning at para. 137, stated as follows:

> The respondent challenges the various sections of the attribution, registration and disclosure provisions under ss. 2(b), 2(d) and 3 of the *Charter*. The attribution, registration and disclosure provisions are interdependent. Thus, their constitutionality must be determined together.
>
> (1) Freedom of Expression
>
> The attribution, registration and disclosure provisions infringe s. 2(b) as they have the effect of limiting free expression. Even where the purpose of the impugned measure is not to control or restrict attempts to convey a meaning, the effect of the government action may restrict free expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976.
>
> As discussed, the attribution, registration and disclosure provisions require third parties to provide information to the Chief Electoral Officer. Where a third party fails to provide this information, they are guilty of a strict liability offence under s. 496 and are subject to a fine, imprisonment or any other additional measure that the court considers appropriate to ensure compliance

> with the Act (ss. 500-501). In this way, the attribution, registration and disclosure obligations have the effect of restricting the political expression of those who do not comply with the scheme.

[60] In applying the *Oakes* test for justification under s. 1 of the *Charter*, the majority in *Harper* first considered, at paras. 75-88, the contextual factors surrounding the impugned provisions, as these would determine the type of proof that the Court would require of a legislature to justify its measures. In conclusion on this point, Bastarache J. stated at para. 88:

> On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.

[61] In determining whether the infringement of s. 2(b) was justified under s. 1 of the *Charter*, the majority in *Harper* characterized the objectives of the attribution, registration, and disclosure provisions at para. 142 as being pressing and substantial. The objectives were twofold; first, to implement and enforce the third party election advertising limits; and second, to provide voters with relevant election information. The provisions were also held, at paras. 143-144, to be rationally connected to these objectives.

[62] With respect to the minimal impairment and proportionality steps of the *Oakes* test, the majority in *Harper* stated as follows at paras. 145-46:

> The attribution, registration and disclosure provisions are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising. The personal information required of contributors, name and address, is minimal. Where a corporation is a contributor, the name of the chief executive officer or president is required. The financial information that must be disclosed, contributions and advertising expenses incurred, pertains only to election advertising. The appointment of a financial agent or auditor is not overly onerous. Rather, it arguably facilitates the reporting requirements.
>
> The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious

> effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been discouraged from contributing to a third party or that a third party has been discouraged from engaging in electoral advertising because of the reporting requirements.

[63] In *United Steelworkers of America, Local 7649 v. Québec (Chief Electoral Officer)*, 2011 QCCA 1043 [*United Steelworkers*], the appellant trade unions and a federation of trade unions challenged the provisions of the Quebec *Election Act*, R.S.Q. c. E-3.3, which essentially prohibits third parties from incurring any "election expenses" during an election campaign. The challenge was grounded, in part, on the basis that the provisions violated their freedom of expression under s. 2(b) of the *Charter*. Duval Hesler J.A. (as she then was) wrote at para. 20 that the impugned provisions were an “undeniable” impairment of freedom of expression, and then went on to consider whether they were justified under s. 1.

[64] The Court in *United Steelworkers* identified at para. 22 the “minimal impairment” step of the *Oakes* test as being the crux of its analysis. The Court stated the standard for this step of the test as follows (para. 46):

> The measure need not be the most minimally impairing measure that can be imagined, but rather one that falls on a reasonable spectrum of possible measures in light of the legislative objectives.

[65] The Court began by expressly rejecting the argument that the existence of less restrictive regimes in other jurisdictions necessarily meant the provisions adopted in Quebec were not minimally impairing. As stated beginning at para. 43:

> The appellants cited the provisions of the *Canada Elections Act*, the same ones that gave rise to *Harper*, *supra*, to argue that the provisions of the provincial Act cannot be considered as minimally impairing freedom of expression. It will be recalled that the federal Act allows third parties to incur election advertising expenses but places a ceiling on such expenses. According to the appellants, this in itself is sufficient to demonstrate that the provincial Act goes too far by totally prohibiting election expenses by third parties. Instead, it should limit them, as the federal legislation does.
>
> …
>
> [This reasoning] implies that, as soon as there exists a solution elsewhere that is less restrictive than that existing under Quebec legislation, Quebec legislation becomes, by that very fact, too restrictive. This type of reasoning by degrees risks depriving legislators of legitimacy in the choices they make, choices that the appellants considered unreasonable, while the questions

> raised concern choices that are purely political. In other words, for a measure to be minimally intrusive, no law enacted in another jurisdiction may constitute a relaxation in relation to Quebec's *Election Act*.
>
> Admittedly, when the *Charter* is involved, comparison with other legal regimes and case law from elsewhere is often relevant and helps to properly understand the issues in cases involving freedom of expression. Even so, to compare the choices made by the Quebec legislature with those made elsewhere concerning a subject as political as the electoral system may create a perverse effect by distorting the consideration of the minimum nature of the impairment. ...
>
> [Footnotes omitted].

[66] In considering the level of impairment resulting from the impugned provisions of the Quebec *Election Act*, the Court stated as follows:

> **47** During the trial, a representative of the appellant FTQ even expressed the wish that trade unions, like non-profit organizations, be allowed to take part in the electoral debate, adding that it would not be desirable for large businesses (Buffoni J., of the Superior Court, cited Bombardier and Hydro-Québec as examples) to enjoy the same rights. But then where do we draw the line? It is not difficult to imagine, using the logic that the Supreme Court recommends for such circumstances, that an NGO could be created, ostensibly with a social purpose, but in reality controlled by one of the large businesses that the FTQ does not want to see participate in the electoral discourse.
>
> **48** Nor have the references to *Libman* convinced me that the Supreme Court appears to have already somewhat resolved the matter. In proposing this avenue of inquiry, the appellant FTQ has overlooked a vital element: Libman was an individual, a voter, and as such central to the concerns and objectives of the Quebec legislature. The Act was written for him and his fellow citizens, not for a legal person with no vote, however commendable its objectives in the public arena may be.
>
> [Footnotes omitted].

[67] The Court in *United Steelworkers* then went on to consider the fourth and final step of the *Oakes* test, i.e. the balance between the benefits and deleterious effects of the legislation. The Court concluded that its intervention was not justified, stating at para. 49:

> In the final analysis, the appellant FTQ has asked this Court to choose for Quebec an electoral system that is different from the one created by its legislature, on the basis of the Court's preferences. The Court's intervention is not justified in this case, however. The impairment constituted by the impugned provisions is minimal because it is reasonable from the standpoint of the objective sought, because everyone is treated in the same way, without regard for financial means or ideals, with voters remaining essential to the

> electoral process and any member of the FTQ retaining the right to contribute in his or her own name to election funds and to the electoral discourse.

[68] In conclusion, the Court made the following remarks, at para. 53, applicable to legislation that governs electoral processes:

> … [I]t is not up to the courts to substitute their choices for those of legislators, and even less to propose electoral reforms. Their supervisory power is limited to determining whether legislative choices are justified and reasonable in our free and democratic society. The temptation to exceed this power may be great … but it is one more reason to resist it in a context where the purpose is precisely the empowerment of the electorate, which after all chooses those who govern it.

[69] In *R. v. Bryan*, 2007 SCC 12 [*Bryan*], a case addressing the constitutionality of federal legislation regulating the dissemination of election results from one electoral district to another, the Court revisited the principles articulated in *Harper*. The majority upheld the legislation as a justified limit on freedom of expression. In separate and concurring reasons written by Bastarache J., his Lordship stated as follows (para. 28):

> In *Harper*, I referred to the contextual factors as favouring a "deferential approach to Parliament": see para. 88. However, in my view the concept of deference is in this context best understood as being about "the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society": *Harper*, at para. 75 (emphasis added). What is referred to in *Harper* and *Thomson Newspapers* as a "deferential approach" is best seen as an approach which accepts that traditional forms of evidence (or ideas about their sufficiency) may be unavailable in a given case and that to require such evidence in those circumstances would be inappropriate. [Emphasis in original].

2. American jurisprudence

[70] While the American jurisprudential record may provide assistance in the adjudication of *Charter* claims, authority from the Supreme Court of Canada indicates that its utility is “limited” and that Canadian Courts are not to be unduly influenced by decisions in American cases: see *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at para. 187. However, as both parties in the present case relied on American authority in their submissions, the relevant cases are canvassed briefly here.

[71] The First Amendment of the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

[72] The United States Supreme Court considered the constitutionality under the First Amendment of a registration requirement in *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) [*Watchtower*]. *Watchtower* was a constitutional challenge by Jehovah's Witnesses to a town ordinance that required people to register and obtain a permit before engaging in door-to-door advocacy. Stevens J. wrote the decision for the majority in striking down the town ordinance on the basis that it unjustifiably interfered with the constitutional right of free expression. As described by Stevens J. at pp. 154-55, the ordinance at issue provided that:

> ...any canvasser who intends to go on private property to promote a cause must obtain a "Solicitation Permit" from the office of the mayor; there is no charge for the permit, and apparently one is issued routinely after an applicant fills out a fairly detailed "Solicitor's Registration Form".

[73] The Solicitor's Registration Form at issue in *Watchtower* required that registrants provide the following information: their name, home address, and previous addresses for the five-year period prior to registration; a description of the nature and purpose of the canvassing; the name and address of the employer or affiliated organization; the length of time for which the privilege to canvass was desired; the specific address of each private residence at which the registrant intended to canvass; and other information as may be reasonably necessary.

[74] The Court in *Watchtower* considered whether there was an appropriate balance between the amount of speech affected by the ordinance and the governmental interests (namely, the prevention of fraud, the prevention of crime, and the protection of residents' privacy) that the ordinance purported to serve. Stevens J. concluded as follows at pp. 165-66:

> The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive - not only to the values protected by the First

> Amendment, but to the very notion of a free society - that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by the mayor's office is a ministerial task that is performed promptly and at no cost to the applicant, a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.

[75] In particular, Stevens J. noted that the requirement to obtain a permit pursuant to the ordinance would have the effect of requiring prospective canvassers to “surrender [their] anonymity” (at p. 166), “impos[ing] an objective burden” on some speech (at p. 167), and banning a significant amount of “spontaneous speech” (at p. 167). Finally, Stevens J. noted that the breadth of the ordinance went far beyond its stated goals. The ordinance was found to be a violation of the First Amendment.

[76] In *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) [*Citizens United*], the U.S. Supreme Court upheld disclosure and disclaimer provisions in a federal elections law, even while striking down third party spending restrictions for unions and corporations as a violation of freedom of speech. The provisions, described at pp. 50-51, required a disclaimer statement of specific length and wording to be included in televised electioneering communications funded by anyone other than a candidate, and required that the name and address of funders be displayed; and required a disclosure statement where more than $10,000 is spent on electioneering communications within a year, including the amount of the expenditure and the names of people contributing to and making the expenditure.

[77] The Court in *Citizens United* held that such provisions served a distinct purpose and were justified by the governmental objectives of providing the electorate with information and ensuring that voters were fully informed about the source of the information. In response to the plaintiff's argument that the disclosure requirements should be confined to speech that is equivalent to “express advocacy”, the Court stated at p. 53 that “disclosure is a less restrictive alternative to more comprehensive regulations of speech.”

[78] The Court also considered the concerns stated by Citizens United that disclosure requirements could have a "chilling" effect on donations by exposing donors to retaliation. On this point, the Court stated at pp. 54-55:

> Some *amici* point to recent events in which donors to certain causes were blacklisted, threatened, or otherwise targeted for retaliation. … [These examples] are cause for concern. Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation.

[79] Finally, the Court indicated that disclosure and disclaimer provisions can enhance the democratic process, stating at p. 55:

> The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.

IV. THE PLAINTIFF'S ARGUMENT

[80] The plaintiff says that it engaged in election advertising in a manner which triggered the s. 239 registration requirements in the 2009 and 2013 provincial elections and that, as a result, its right to free expression has been compromised, and will continue to be compromised in future elections if s. 239 remains enforceable. The plaintiff points out that if individuals and organizations do not register as required by the *Act* before they engage in political expression, s. 264(1)(h) of the *Act* provides that they have committed an offence and will be liable to be jailed for up to a year, fined up to $10,000, or both.

[81] The plaintiff submits, relying on *Election Act Reference* and *Figueroa* in particular, that political speech and expression is recognized as being of particular importance to protect under s. 2(b) of the *Charter*. As a matter of first principles, says the plaintiff, absent justification under s. 1 of the *Charter*, people in Canada do not need to notify the government or be registered or obtain a permit before exercising their constitutional rights. In the plaintiff's view, that is the difference between a right and a privilege.

[82] The plaintiff provides the following examples: If, before attending a place of worship, people had to complete a government form declaring their intention to practice religion, have it notarized, file it at a government office, and await the government's approval, the right to freedom of religion would obviously be impaired. Similarly, says the plaintiff, if a union organizer had to do the same before calling a meeting among workers, the right to freedom of association would also be impaired.

[83] The plaintiff draws an analogy between these examples and the effect of s. 239 of the *Act*. From the moment an individual or organization has the impulse of expression in a way that would constitute "election advertising", until approval of their application for registration, the plaintiff says their freedom is curtailed.

[84] In the plaintiff’s submission, the registration regime under the *Act* is very similar to that discussed in *Watchtower* and it clearly infringes on the s. 2(b) right of free expression. The plaintiff also relies on *Harper*, where the registration provisions, along with other provisions, of the impugned legislation were found to have the effect of violating s. 2(b).

[85] The plaintiff states that the real issue in the instant case is whether the infringement is saved by s. 1. The plaintiff notes that the decision in *Harper*, where the Court found that the infringements of s. 2(b) were saved under s. 1, did not consider registration provisions that apply to expenditures under $500.

[86] With respect to the test under s. 1 of the *Charter*, the plaintiff says that where an individual's or organization's third party election advertising expenditures are less than $500, the registration scheme in the *Act* cannot be demonstrably justified.

[87] In the plaintiff’s view, s. 353 of the *Canada Elections Act*, and similar provisions in other Canadian jurisdictions, suggest that British Columbia's legislation is not minimally impairing. Such provisions, in the plaintiff’s submission, ensure that the requirements of registration do not capture election advertising that is of an amount unnecessary to monitor for the purposes of ensuring a fair electoral process.

[88] The plaintiff argues that the infringement of s. 2(b) is "unnecessary" and therefore cannot be minimally impairing of the right of free expression. Drawing from the April 2010 Report of the Chief Electoral Officer on Recommendations for Legislative Change, referred to by Ms. Western in her affidavit, the plaintiff notes that the CEO has recommended that registration not be required unless the value of election advertising undertaken is $500 or greater. As stated at p. 16 of that report:

> [The *Act*] does not establish a threshold for registration, resulting in all advertising sponsors being required to register and display disclosure information - including individuals with a simple handmade sign in their window. The *Canada Elections Act* only requires registration by those who sponsor election advertising with a value of $500 or more. Having a consistent threshold would prevent the considerable confusion and administrative burden that currently exists.

[89] Accordingly, says the plaintiff, the CEO considers the objective of s. 239 as "substantial and pressing" only for third party election advertisers who spend $500 or more. In the plaintiff's submission, this recommendation is consistent with the overall goal of the third party election advertising provisions as identified in the *Election Act Reference*, i.e. to prevent election discourse from being dominated by the wealthy.

[90] The plaintiff says that while some of the registration information gathered from lower-spending third parties pursuant to s. 239 may be used from time to time, it is not "needed", and thus, the Attorney General's evidence falls short of justifying the infringement on s. 2(b) rights.

[91] In summary, the plaintiff states that, in light of (a) the lack of s. 1 evidence presented by the Attorney General, (b) the recommendation of the CEO and the affidavit of Ms. Western, (c) the legislation across Canada containing minimum expenditure thresholds for third party election advertising, and (d) the Supreme Court of Canada's endorsement in *Libman* of a minimum threshold as a means to ensure legislation is minimally impairing, the infringement on freedom of expression by s. 239 of the *Act* is not saved under s. 1 of the *Charter.*

[92] Finally, the plaintiff makes submissions on what it views as the appropriate remedy. Drawing from *Libman*, and, in particular, the recommendations of the Lortie

Commission discussed at paras. 77-81 therein, the plaintiff submits that a minimum expenditure threshold would strike an appropriate balance between absolute individual freedom of expression and equality of expression between the proponents of the various choices in an election. Specifically, the plaintiff proposes a declaration to the effect that registration not be required below a $500 minimum threshold, which it says is the standard threshold in most Canadian jurisdictions and is consistent with the recommendation of the CEO.

[93] In the alternative, if the Court declines to specify the minimum expenditure threshold, the plaintiff submits that the appropriate remedy is to declare s. 239 invalid and allow the provincial Legislature to enact an appropriate threshold.

V. THE ATTORNEY GENERAL'S ARGUMENT

[94] The Attorney General notes that the plaintiff's complaint is not with the registration requirement under s. 239 *per se*, but rather with the failure of the Legislature to establish a minimum spending threshold to trigger it. The Attorney General submits that, according to the plaintiff, requiring the registration of sponsors is constitutionally permissible at a spending threshold of $500, but unconstitutional as applied to a sponsor who spends $50 or even $450 on election advertising.

[95] The Attorney General argues that the plaintiff has provided no evidence that any person, association, or corporation has been restricted in its ability to engage in election advertising because of the registration requirement since the requirement was first enacted in 1995. The burden imposed on the plaintiff by a requirement to register with the CEO is, in the Attorney General's submission, trivial and insubstantial and does not limit the content or nature of election advertising.

[96] The Attorney General points to the plaintiff's own election advertising in 2013 to illustrate the point. The plaintiff's activity, as described by the Attorney General, included creating and distributing a survey to elicit the views of party leaders on information and privacy issues, creating website postings designed to make information and privacy rights an election issue, and maintaining a Twitter feed. The value assigned to these activities, according to the Attorney General, was nil. The

Attorney General draws from the affidavit of Ms. Western to explain that a sponsor need not assign a value to a staff member's work, or ongoing website costs, even if the work and web postings relate to election advertising.

[97] The Attorney General submits that the preceding point is important in the context of the plaintiff's constitutional challenge. While the plaintiff asserts that the lack of a minimum threshold for registration catches "small spenders", in the Attorney General's submission, this is not inevitably true. Established organizations, like the plaintiff, can engage in a significant amount of election advertising with a "nil" value because they have staff members and a permanent website.

[98] The Attorney General disputes the plaintiff's assertion that a registration requirement is, *per se*, a violation of s. 2(b). The Attorney General acknowledges that the activity in issue falls within the scope of protected expression under s. 2(b), but does not concede that either the purpose or effect of the registration requirement in s. 239 restricts expressive activity in a manner that infringes s. 2(b) of the *Charter*.

[99] The Attorney General acknowledges the importance of political speech, but relies on the minority decision in *Harper*, at para. 17 (reproduced above), to state that the freedom to speak and the freedom to hear are two sides of the same coin. Thus, in the Attorney General's submission, *Charter* guarantees, including not only s. 2(b) but also the right to vote protected by s. 3 of the *Charter*, promote the opportunity for meaningful participation - both for the speaker and the listener.

[100] In considering the second step of the *Irwin Toy* test - whether the purpose or effect of s. 239 infringes free speech - the Attorney General says the Court must consider both s. 231 and s. 239 together. Those provisions, in the Attorney General's submission, operate in concert to create the regulatory regime in British Columbia that allows voters to be aware of who is participating and what advertising each participant is sponsoring, and also allows the CEO, as the independent officer charged with administering elections, to communicate with participants, advise them of their obligations under the *Act*, and monitor the electoral process.

[101] The purpose of ss. 231 and 239 is not to restrict speech, argues the Attorney General, but to increase transparency, openness, and public accountability in the electoral process, and thereby to promote an informed electorate. The provisions ensure, in the Attorney General's submission, that those who wish to participate in the electoral process as third party sponsors can be identified and made known to the public, and to allow Elections BC to contact them (including in advance of any advertising occurring to ensure the applicable rules are understood). The Attorney General notes that, unlike the registration requirement at issue in *Watchtower*, s. 239 does not operate in the context of everyday public discourse but is confined to the 28 days preceding an election every four years.

[102] The Attorney General denies an unconstitutional effect of the provisions; on the contrary, it says the evidence demonstrates that the plaintiff has engaged in election advertising during the last two general elections. The requirement to complete a one-page form is, at best, in the Attorney General's submission, the kind of trivial and insubstantial burden which the *Charter* does not require be eliminated.

[103] The Attorney General submits that the plaintiff cites no authority for the proposition that a bare registration requirement for election advertising sponsors violates s. 2(b) of the *Charter*. The Attorney General submits that the current challenge presents a very different factual and legal situation than that in *Harper*.

[104] To the extent that a bare registration requirement violates the right to free expression, which is disputed by the Attorney General, the Attorney General says it is justified under s. 1 of the *Charter*.

[105] The Attorney General submits that with respect to the "pressing and substantial objective", the plaintiff appears at times to conflate the objective of the third party election advertising spending limits - which is to preserve electoral fairness by preventing election discourse from being dominated by the wealthy - with the distinct objective of the registration requirements. Unlike in *BCTF* and the *Election Act Reference*, says the Attorney General, the third party election advertising spending limits are not challenged here.

[106] The registration requirement in s. 239, says the Attorney General, has a distinct objective, which is to promote transparency and public accountability in the electoral process and thus to encourage an informed electorate. Referring to *Bryan*, at para. 32, the Attorney General asserts that this stage of the s. 1 analysis is not "an evidentiary contest"; but instead assesses "whether the Attorney General has asserted a pressing and substantial objective". The Attorney General submits that the goals of increased transparency and public accountability in the electoral process are objectives to be simply accepted by the Court.

[107] Turning to the rational connection step of the test, the Attorney General says it is reasonable to suppose that the registration requirement will further the goals identified above, which it says is sufficient for this stage of the test. Section 239 works in conjunction with the identification requirements in s. 231 of the *Act*, to ensure that advertising identifies the registered sponsor and that the list of registered sponsors is available to the public. The rational connection to the objectives of increasing transparency, accountability, and informed voters is, in the Attorney General's submission, obvious.

[108] The Attorney General opposes the plaintiff's position that if other jurisdictions have adopted minimum thresholds, this necessarily means that British Columbia's provisions are not minimally impairing. The Attorney General submits that a direct comparison of registration rules between jurisdictions is unhelpful without considering also the associated rules. The Attorney General points to the *Canada Elections Act*, where there is a minimum spending threshold of $500, but third party advertisers are subject to more onerous requirements once that threshold is met, and the New Brunswick *Political Process Financing Act*, S.N.B. 1978, c. P-9.3, where a third party incurring election advertising expenses of $500 or more must appoint a chief financial officer to assume various responsibilities.

[109] In contrast, the Attorney General notes that the *Act*, though having no minimum threshold for registration, imposes less onerous obligations on a third party spender reaching the $500 threshold than other jurisdictions that have enacted a

minimum threshold for registration. In turn, the $500 threshold in other jurisdictions may, in the Attorney General's submission, possibly create a greater exposure to sanctions for third parties than British Columbia's approach.

[110] The Attorney General submits that legislative choices made by other jurisdictions can neither dictate nor constitutionally invalidate the choices made by the Legislature in British Columbia.

[111] With respect to the final stage of the s. 1 analysis, the Attorney General submits again that the degree of burden imposed by the registration requirement is trivial and insubstantial. In a modern electoral system, the Attorney General says it is both reasonable and justifiable for the government to regulate participation of third party sponsors by requiring them to complete a one-page registration form. The Attorney General notes again that the regulation operates for a period of 28 days every four years on a schedule known in advance. The collective goals of increasing transparency and public accountability, and thereby promoting informed voting, in the Attorney General's submission, easily outweigh any alleged costs.

[112] The Attorney General also submits that registration and disclosure provisions are qualitatively different. Registration provisions, in the Attorney General's submission, do not limit speech; rather, they serve democratic objectives in promoting both transparency in the electoral process and an informed electorate.

VI. THE ISSUES

[113] At issue in this case are two constitutional questions:

(a) Does the registration requirement in s. 239 of the *Act* infringe the right to free expression in s. 2(b) of the *Charter* insofar as it applies to individuals and organizations who incur less than $500 in third party election advertising expenses?

(b) Is the infringement justified under s. 1 of the *Charter*?

VII. ANALYSIS

A. Infringement

[114] In applying the test from *Irwin Toy*, as set out above, for infringement of s. 2(b) of the *Charter*, the first question for consideration is whether the government activity at issue falls within the sphere of conduct protected under s. 2(b) of the *Charter*. In this case, the government activity at issue is the requirement that third party election advertisers register with the CEO pursuant to s. 239 of the *Act*, irrespective of the amount they spend in advertising. The Attorney General has, in my view, correctly conceded that the activity does fall within the protected sphere of conduct. The protection of political expression lies at the heart of the guarantee of freedom of expression, and third party advertising is clearly a form of political expression that enriches and broadens political discourse in a democratic society. In its regulation of third party advertising, the *Act* clearly falls within the sphere of conduct protected under s. 2(b).

[115] I turn next to consider the second step of the *Irwin Toy* test; that is, whether, first, the purpose, or second, the effect of the government action is to restrict freedom of expression.

[116] The Attorney General asserts, and I find, that the purpose of s. 239 is not to restrict speech but to increase transparency, openness, and public accountability in the electoral process, and thus to promote an informed electorate. The requirement for registration, operating together with other provisions of the *Act*, increases transparency such that voters are better able to discern and confirm who is sponsoring the advertising of various aspects of the political discourse, and facilitates the CEO's oversight of the process. This is consistent with the stated goal of the *Act* to make the electoral process "more fair, open and accessible to all voters" as stated in 1995 by then Attorney General Colin Gabelmann.

[117] The fact that s. 239 only operates during the 28 days preceding an election every four years, and that the process of registration, as outlined under s. 240, is purely administrative in nature, lend support to this finding. On the latter point, I note

in particular that if the application requirements are met, the CEO "must" register the applicant as a registered sponsor: see s. 240(5) of the *Act*. This does not suggest that the government's purpose in enacting s. 239 is to limit either the content or nature of election advertising.

[118] The effect of s. 239, on the other hand, is to infringe freedom of expression. The plaintiff in the present case has stated its claim in its written submissions in part as follows:

> Under s. 239, if an individual or organization wants to express themselves about a matter of importance to them politically in a way that would constitute "election advertising", they cannot do so until they register. The moment they have the impulse of expression until the processing and approval of their application for registration, their freedom is curtailed. If they don't comply with the registration regime, they risk punitive state sanctions.

[119] In my view, the plaintiff's claim speaks directly to one of the values outlined in *Irwin Toy* (at para. 53) as underlying the freedom of expression; namely, that participation in social and political decision-making is to be fostered and encouraged. It is clear in this case that the plaintiff's activity, in engaging in election advertising, promotes this activity.

[120] Where a third party wishes to engage in election advertising that triggers the s. 239 requirements, it cannot do so until it is registered by the CEO (or risk a penalty imposed under s. 264). While it appears from the legislation that a third party can apply to register in advance of the campaign period, it is clear from the discussion of the importance of political expression, above, that the guarantee under s. 2(b) was not meant to protect only planned or premeditated forms of expression. In particular, I draw from the comments of Iacobucci J. at paras. 28-29 of *Figueroa* to the effect that "full" and "open" political debate are the desired ideals, and that participation in the electoral process has, of itself, "an intrinsic value".

[121] It is plain that the requirement to register under s. 239 would have the effect of restricting spontaneous or unplanned election advertising, which, like other forms of political expression, enriches political discourse. In limiting participation in this way, s. 239 has the effect of infringing the value underlying s. 2(b) of the *Charter*.

[122] In reaching this conclusion, I have noted that not all public commentary is captured by the definition of "election advertising" in s. 228 of the *Act*. Many forms of expression are exempted from the definition and would not require a third party to register at all. However, that some, but not all, forms of expression are infringed upon does not affect the outcome at this stage of the test.

[123] The final question for consideration under the first issue is whether the burden imposed by the registration requirement is so "trivial or insubstantial" as to not incur the need to apply the test under s. 1 of the *Charter*.

[124] Given the fundamental importance of all forms of political expression (as long as such expression is not violent: *Irwin Toy*, at para. 42) to democratic society, the fact that spontaneous or unplanned forms of election advertising may be most affected by the requirement to register is not a trivial or insubstantial effect.

[125] I note that the Attorney General's position on this point, that s. 239 imposes only a trivial or insubstantial burden, is based on the nature of the registration requirement itself, i.e. that a third party advertiser need only complete a one-page form. While I agree that regulation, by itself, will not necessarily constitute a sufficient burden to be considered a *Charter* violation, the inquiry at this stage of the analysis is not limited to the nature of the regulatory requirement but asks whether the *effect* of the legislation is trivial or insubstantial. In discussing the principle in the context of s. 2(a) of the *Charter* (freedom of religion), Wilson J. wrote in *Jones* at para. 67:

> … not every effect of legislation on religious beliefs or practices is offensive to the constitutional guarantee of freedom of religion. Section 2(a) does not require the legislature to refrain from imposing any burdens on the practice of religion. Legislative or administrative action whose effect on religion is trivial or insubstantial is not, in my view, a breach of freedom of religion.

[126] Though the requirement to complete the registration pursuant to s. 239 of the *Act* may not, by itself, be onerous, this inquiry alone does not address the principle set out in *Jones* and *Edwards Books*. Here, the legislation has another effect, aside from its administrative requirement, that is not trivial or insubstantial.

[127] Further consideration of the weight of these burdens, relative to the salutary effects of s. 239, will be taken into account in the analysis under s. 1.

B. Justification

[128] The first question for the Court's consideration under s. 1 of the *Charter* is whether the impugned provision (in this case, s. 239 of the *Act*) is directed toward an objective that is sufficiently pressing and substantial to justify limiting a *Charter* right.

[129] I find that it is. As stated above, the purpose of s. 239 is to increase transparency, openness, and public accountability in the electoral process, and to promote an informed electorate. These objectives are crucial to a free and democratic society, and thus sufficiently pressing and substantial to justify limiting a *Charter* right. In my view, the case at bar is one where a reasoned apprehension that the absence of a registration requirement would be contrary to these objectives is sufficient for this stage of the test: *Pacific Press*, at para. 78; *Harper*, at paras. 77, 88; *Bryan*, at para. 28.

[130] I note here that the value of the right to freedom of expression benefits not just those who choose to express themselves, but, in the context of political discourse, those who seek information. As stated by the minority in *Harper*, at para. 17, "the *Charter* protects listeners as well as speakers". An informed vote is an important objective in its own right (*Harper*, at para. 140). By aiming to increase transparency, openness, and public accountability in the electoral process, and to promote an informed electorate, s. 239 not only addresses pressing and substantial objectives, but in fact is attentive to the very value that s. 2(b) of the *Charter* intends to protect.

[131] Next, I turn to consider proportionality.

[132] First, I find that the measure of requiring registration for all third party election advertisers is rationally connected to the objectives identified above. The registration requirement under s. 239 increases transparency by allowing the CEO to receive notice and confirmation of which third parties are engaging in election advertising. In turn, third party sponsors can be identified and made known to the public, and

contacted by Elections BC in case of a problem in compliance with the other advertising regulations. In this way, s. 239 facilitates openness and public accountability in the electoral process. Finally, by making verified information available to the public, s. 239 promotes an informed electorate, as those receiving the election advertising are able not only to hear the message it promotes, but to identify its source and make informed decisions as to the weight they will give it.

[133] Section 239 operates in concert with s. 231 of the *Act*, which requires that the identity of a sponsor be disclosed on election advertising (a provision not challenged by the plaintiff). The added benefit of the requirement under s. 239 is obvious; that is, the registration process requires that the application include a name, contact information, signature, and solemn declaration on behalf of the registrant: s. 240. In this way, the identity of the registered advertiser is confirmed and verified and public accountability is better fostered.

[134] On the minimal impairment step of the *Oakes* test, the plaintiff urges the Court to find that the registration requirement under s. 239 of the *Act* is not justified because other Canadian jurisdictions have enacted a minimum expenditure threshold for third party registration.

[135] Similar lines of argument were specifically rejected in *BCTF* and in *United Steelworkers* and I cannot accede to it here. In *BCTF*, counsel for the Attorney General submitted that the fact that other countries had legislative restrictions on third party election advertising spending weighed in favour of similar restrictions in British Columbia. At trial, Cole J. noted key differences in the legislation before the Court and that from other jurisdictions, and then stated at para. 237:

> … while the approaches taken in these other jurisdictions are interesting, I consider them neutral in my analysis in the instant case. Simply because other governments have chosen to enact similar legislation is not conclusive as to its necessity.

[136] The comments above were upheld on appeal. Ryan J.A. stated at para. 60:

> I would add that the systems are not necessarily parallel. Without a full examination of the entirety of the electoral schemes of the countries under consideration, one cannot be confident that it is sensible to isolate third-party

> spending limits as a discrete area of examination to justify the specific provision in our legislation.

[137] I note also the remarks by the Court in *United Steelworkers*, at para. 45, that such comparisons risk finding the legislation in one jurisdiction to be “too restrictive” under the minimal impairment step of the test, simply because the legislation in another jurisdiction is “less restrictive”.

[138] I do not accept the plaintiff’s argument, based on the affidavit of Ms. Western, that the registration information gathered under s. 239 is only used from time to time by Elections BC, and thus, cannot justify the infringement of s. 2(b) rights under the minimal impairment test. The purpose of s. 239, as discussed above, includes transparency and accountability. That third parties are required to provide contact information in order to participate in election advertising promotes both these goals, even if most registrants are never contacted.

[139] I also remain unconvinced by the plaintiff’s argument, on the basis of the CEO’s recommendation, that registration under s. 239 is only “substantial and pressing” for third party advertisers who spend $500 or more.

[140] First, as I understand the CEO’s report, the recommendation is only a comment on what would be more administratively convenient for the CEO. It is not a comment on the constitutionality of s. 239, or even a recommendation for improvement of the electoral process with a view toward the legislative objectives described above. Even if it were intended as either of the latter, the Court is not bound by this opinion.

[141] Second, I am not satisfied that the deleterious effect of the registration requirement, which the plaintiff describes as inhibiting the impulse of expression, and possibly specific forms of expression, would be ameliorated by creating a minimum threshold of expenditure to trigger the requirement. While the overbreadth of a legislative measure may result in it being found an unjustified infringement of a *Charter* value under the s. 1 test, such a finding occurs where the effect of the impugned legislation overshoots the objective it purports to achieve (see e.g. *BCTF*, at para. 70).

[142] Here, the main deleterious effect is the inhibition of the impulse of political expression. If, for example, someone had a sudden desire to print and distribute pamphlets on a particular election issue during the campaign period, is it better that an individual who spends $600 is compelled under s. 239 to wait until the registration process is completed, but an individual who spends $400 is not? I am not persuaded that it is.

[143] The objective of the minimal impairment step of the *Oakes* test is to assess whether the legislation in question falls along a “range” or “spectrum” of reasonable alternatives in light of the legislative objectives (*RJR-MacDonald*, at para. 160; *United Steelworkers*, at para. 46), not to find the measure that impairs the least. The Courts will accord legislators a measure of deference when considering whether the impugned measure meets this test: *RJR-MacDonald*, at para. 160.

[144] In the present case, I find that the registration requirement under s. 239 of the *Act* is a reasonable approach, within the spectrum of possible measures, in light of the legislative objectives of aiming to increase transparency, openness, and public accountability in the electoral process, and promoting an informed electorate.

[145] Finally, I turn to the fourth step of the *Oakes* test to determine if there is proportionality both between the legislative objective of s. 239 and its deleterious effects, and between the deleterious and salutary effects of s. 239.

[146] I begin this stage of the analysis by noting that the plaintiff has not asked the Court to strike down s. 239 of the *Act* in its entirety, but rather, seeks a declaration that registration need not be required below a $500 threshold. As an alternate remedy, the plaintiff asks the Court to declare s. 239 invalid and allow the Legislature to enact an appropriate threshold.

[147] In my view, the Legislature has already enacted the threshold it sees as appropriate, in that any advertising, which constitutes “election advertising” under the *Act*, will trigger the requirement to register. It is not the role of the Court to substitute its own, or, indeed, the plaintiff’s, view as to what would be an appropriate legislative provision. The role of the Court in this proceeding is to come to a

conclusion as to whether s. 239, as written, is constitutionally valid, not to instruct as to whether the plaintiff's preferred measure would be more or less "proportionate" than the one currently in force.

[148] In my view, the salutary effects of the impugned measure outweigh the deleterious effects. The most concerning impact of the registration requirement, in my view, is the restrictive effect on spontaneous political expression. The process of registering under the *Act*, on the other hand, requires providing minimal personal information and undergoing a minimal administrative inconvenience. The salutary effect of s. 239 is that it facilitates the implementation and enforcement of third party election advertising regulations, and, in turn, increases the transparency, openness, and accountability of British Columbia's electoral process, and promotes an informed electorate.

VIII. CONCLUSION

[149] In light of the foregoing, I conclude that s. 239 of the *Act* is an infringement of the right to free expression under s. 2(b) of the *Charter*, but that the provision can be upheld under s. 1 of the *Charter* as a demonstrably justified limit in a free and democratic society. The plaintiff's application is therefore dismissed.

"B.I. Cohen J."

The Honourable Mr. Justice B.I. Cohen